STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 7, 2005
v	No. 253747 Saginaw Circuit Court
CHRISTOPHER JAMES HORONZY, Defendant-Appellant.	LC No. 03-022765-FH

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for conspiracy to commit home invasion, MCL 750.157a, and home invasion, MCL 750.110a(2). Defendant was sentenced to concurrent terms of forty months to twenty years' imprisonment for the convictions. We affirm.

Defendant's convictions arise out of a plan between defendant and Kevin Tanney to break in to a house, and the break-in that actualized from that plan. After complainant reported the home invasion, defendant's vehicle was located in a suspicious location near the home. Police did not search the vehicle at that time, but ran the license plate number and determined the vehicle belonged to defendant. Later that day, police made contact with defendant in his driveway at which time they found binoculars, heavy-duty scissors, wire cutters, and identification for Tanney in defendant's vehicle. Subsequently, at the station, defendant voluntarily gave police a knife and flashlight that he had on his person.

Defendant received his *Miranda*[1] rights and signed a waiver before questioning at the police station. During questioning by police, defendant indicated that he and Tanney had talked about breaking in to a home "to get something for free," and that Tanney picked the home and that only Tanney entered the home. Defendant told police that he walked around the house with Tanney who tried to open several doors with the knife that defendant had given the police. When those attempts failed, defendant indicated that he waited outside the home with the knife while Tanney entered through a window, fell, and ran out the front door of the house because the homeowners woke up. Defendant provided a written statement in which he stated that he did not

[1] *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

attempt to break into or enter the residence, but only watched while Tanney tried and eventually broke in.

Prior to jury selection, defendant's counsel indicated that defendant wanted to plead guilty to the conspiracy charge in exchange for dismissal of the home invasion charge, in accordance with a plea bargain agreed to by the prosecutor. When the trial judge asked defendant if he wanted to plead guilty, defendant wavered several times, once indicating, "I just didn't want to plead guilty to something that I didn't do, but I know that I can't ---." After which, defense counsel said, "Then you should go to trial." Defendant responded, "Carry a trial through because of the way it's written up." After jury selection, the trial judge again asked defendant whether he wanted to plead guilty or go to trial. Defendant indicated he wanted to plead guilty, but the trial judge rejected the plea, stating that defendant had already indicated his belief that he was innocent.

Defendant first argues that the trial judge did not have authority to reject a plea agreement agreed upon by defendant and the prosecution because there was no plea cutoff deadline, and because defendant was not under oath when he made the comments that formed the basis of the trial judge's rejection. We disagree.

The trial judge's decision whether to accept or reject a plea is reviewable for an abuse of discretion. *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997). Issues arising from the interpretation and application of statutes and court rules are reviewed de novo. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004); *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003).

First, defendant provides no authority, and we have not found authority supporting that defendant's pre-oath comments could not be taken into account when rejecting a plea agreement. Arguments must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

The pertinent question is whether the trial court had the authority to reject defendant's guilty plea in this case. Although MCR 6.301(B) indicates that a guilty plea does not require the court's consent, MCR 6.302 states, in relevant part:

> (A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate.

Defendant vocalized his belief that he was innocent and was pleading guilty only because of the way the charges were written. The trial court was reasonable in concluding that defendant's guilty plea was not understanding, voluntary, and accurate as required by MCR 6.302. The trial court did not abuse its discretion in denying the plea because the comments made by defendant indicated that the plea may not have been voluntary or accurate. Additionally, as the Supreme Court articulated in *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971), there is no constitutional right to have a guilty plea accepted and a court may reject a plea in exercise of sound judicial discretion. Furthermore, the fact that a plea cutoff deadline did not exist in this case does not make the trial court's rejection an abuse of discretion. See *People*

v Austin, 209 Mich App 564; 531 NW2d 811 (1995).[2] We find that the trial court did not abuse its discretion in rejecting defendant's plea agreement.

Next, defendant raises claims of ineffective assistance of counsel relating to his trial counsel's performance. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel's representation prejudiced the defendant in a way that deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Stated in another way, the defendant is required to show that but for his counsel's error, there was a reasonable probability that he would have been acquitted, and that the trial was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first argues that his trial counsel was ineffective for failing to move for suppression of confessional statements because he was not properly advised of his *Miranda* rights. We disagree. Since an attorney is not obligated to advocate a legally meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), ineffective assistance of counsel was not established here because there was no basis from which defense counsel could have moved to suppress defendant's statements. First, defendant signed a *Miranda* waiver, and answered "No" when asked if he wanted an attorney. Next, no coercive tactics during police questioning were revealed at trial, and defendant's claim that he was told that he would be released if he gave a statement did not rise to a level of coercion. Lastly, looking at the totality of the circumstances, defendant was in police custody a very short time before being driven home by police, and all confessional statements were made after he signed a waiver, indicating that moving to suppress such statements would have been meritless. See *Snider, supra*.

Defendant next claims that his trial counsel was ineffective for failing to challenge the credibility of his confessional statements. We disagree. In fact, the bulk of counsel's questions at trial to the officer who took defendant's statement, were precisely to challenge the credibility of defendant's statements, asking why the interview was not recorded, why the officer's notes were destroyed, and why the written and verbal statements differed. Defense counsel adequately challenged this issue, and moreover, this is a matter of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will this Court assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). That a strategy does not work does not render its use ineffective

[2] Contrary to defendant's argument, the *Austin* decision does not support that rejecting a guilty plea due to lateness alone is an abuse of discretion. In fact, this Court in *Austin* stresses the importance of the trial court's interest in docket control and conserving judicial resources. See *Austin, supra* at 567.

assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Thus, this issue is without merit.

Defendant next contends that his trial counsel was ineffective because he failed to move for a *Walker*[3] hearing to suppress the evidence found in defendant's vehicle, on the basis that it was an illegal search and seizure. Because defendant failed to make a testimonial record before the trial court in connection with a motion for a new hearing or an evidentiary hearing, our review is limited to the facts contained on the record. *People v Ginther*, 390 Mich 436,443; 132 NW2d 87 (1965); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The record does not contain the exchange that occurred before defendant's vehicle was searched. On this record, however, defendant was cooperative with police throughout the investigation, and defendant merely asserts that he did not grant permission to search, but fails to support such position by affidavit or proof regarding facts to be establish at a hearing. See MCR 7.211 (C)(1)(a)(ii). Additionally, defendant failed to show, or even address, that the outcome of the trial would have been different but for counsel's alleged mistakes, when a great deal of additional evidence against defendant existed. Because there is no indication that the result of the proceeding would have been different and a review of the record supports the even without the evidence acquired from the vehicle there is a not a reasonable probability that defendant would have been acquitted, defendant has not established ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[3] *People v Walker* (On Rehearing), 374 Mich 331, 132 NW2d 87 (1965).